



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

NOV 29 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Benjamin L. Ginsberg, Esq.
William J. McGinley, Esq.
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037-1350

Re: MUR 5487
Progress for America Voter Fund

Dear Messrs. Ginsberg and McGinley:

On July 28, 2004, the Federal Election Commission notified your client, Progress for America Voter Fund ("PFA-VF"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint and information provided by your client, the Commission, on November 19, 2004, found that there is reason to believe that your client violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, by knowingly accepting contributions in excess of \$5,000, and by knowingly accepting corporate and/or union contributions. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. Please note that respondents have an obligation to preserve all documents, records and materials relating to the Commission's investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 30 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred.

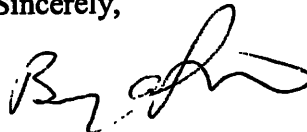
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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact April Sands, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Bradley A. Smith
Chairman

Enclosures

Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Progress for America Voter Fund

MUR: 5487

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission (“the Commission”) by Democracy 21, Campaign Legal Center, and the Center for Responsive Politics. *See* 2 U.S.C. § 437g(a)(1). The complaint alleges that Progress for America Voter Fund (“PFA-VF”), an entity organized under Section 527 of the Internal Revenue Code, has violated various provisions of the Federal Election Campaign Act of 1971, as amended (“the Act”). PFA-VF has not registered as a “political committee,” nor does it appear to be affiliated or associated with a registered political committee. The complaint alleges that PFA-VF is a federal political committee as defined by the Act which has failed to register and report with the Commission and failed to comply with the Act’s contribution limits and source prohibitions. In its Response, PFA-VF denies being a political committee.

II. FACTUAL AND LEGAL ANALYSIS

A. FACTS

PFA-VF was formed on May 27, 2004. In its filing with the IRS for the third quarter (July-September) of 2004, PFA-VF lists receipts of \$28.3 million and disbursements of \$22.9 million. In thirty electioneering communications reports filed with the Commission, PFA-VF lists \$72,070,250 in donations received and \$29,810,435 in electioneering communications made

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covering the period from June 23 through October 29, 2004.¹ According to a news article reprinted on its website, PFA-VF raised \$6.8 million in contributions during the first six days of September alone.² In its Response to the complaint, PFA-VF states that it “has established two separate bank accounts – one for donations from individuals and another separate account for donations from corporations and other business entities.”

PFA-VF solicits donations on its website. Until very recently, the webpage soliciting contributions to PFA-VF specifically stated that a donor’s contribution will “help launch TV ads” with a picture next to it of President Bush on a television screen.

PFA-VF’s website homepage displays a photograph of John Kerry on what appears to be the side of a milk carton with the caption, “Have you seen this man?” After stating that “John Kerry missed 87% of roll call votes in the U.S. Senate,” and listing some of those votes, the bottom of the “milk carton” reads, “If found, please do not return to public office.” Until recently, when one clicked on the Kerry picture, the pop-up automatically returned the viewer to the top of the homepage where contributions were solicited for the television advertising campaign noted above.

While PFA-VF denies in its Response that any of its communications contain express advocacy, its website provides at least one example of it. The depiction of John Kerry on the side of a milk carton on the organization’s website with the statement “If found, please do not return to public office” clearly speaks to the reader as voter and is, in effect, an explicit directive to take electoral action. *See* 11 C.F.R. § 100.22; *FEC v. Christian Coalition*, 52 F. Supp.2d 45, 65 (D.D.C. 1999). The fact that this depiction is linked to the organization’s online solicitation

¹ PFA-VF has received substantial donations from individuals, including at least five donations of at least \$1 million each and at least two \$5 million donations.

² <http://www.pfavoterfund.org/1151-15.1151-092404A.html>

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webpage indicates that PFA-VF has used express advocacy to raise funds on its website and may be using express advocacy to raise funds through other methods of communication, such as direct mailing.

It appears that PFA-VF's primary activity is to fund television advertisements which clearly identify Republican Presidential candidate George Bush, Democratic Presidential Candidate John Kerry, or both.³ All of the PFA-VF advertisements produced to date praise the quality of Bush's leadership as President after September 11, 2001 and question Senator Kerry's ability to provide similar leadership.⁴ The thirty electioneering communications reports PFA-VF has filed with the Commission to date list just two candidates, President Bush and Senator John Kerry.⁵ There is no information on the PFA-VF website about any other candidates for federal, state or local office.

B. ANALYSIS

It appears that PFA-VF is a "political committee" subject to the contribution limitations, source prohibitions, and reporting requirements of the Act. *See* 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b. The Act defines a "political committee" as any committee, club, association, or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year.

2 U.S.C. § 431(4)(A). The term "contribution" is defined to include any gift, subscription, loan,

³ *See* <http://www.pfavoterfund.com/> for audio and video.

⁴ PFA-VF also touts its connection to the Bush campaign. According to a news article reprinted on PFA-VF's website, one of its advisory board members and large donors also is a top fundraiser for the Bush campaign.

⁵ Brian McCabe, President of PFA-VF, promised "to go forward with more ads in more places." McCabe assured that more fundraising by PFA-VF could be expected: "We intend to raise millions for additional ads that will tell our side of the story and rebut this well-funded liberal propaganda machine." *See* <http://www.pfavoterfund.com/1151-15.1151-063004D.html> and <http://www.pfavoterfund.com/1151-15.1151-062804B.html>

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advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8)(A)(i). *See, e.g., FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2nd Cir. 1995) (where a statement in a solicitation “leaves no doubt that the funds contributed would be used to advocate [a candidate’s election or] defeat at the polls, not simply to criticize his policies during the election year,” proceeds from that solicitation are contributions).

PFA-VF is a Section 527 organization that files reports with the IRS. By law, a 527 organization is “a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” 26 U.S.C. § 527(e)(1). The “exempt function” of 527 organizations is the “function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State, or local public office or office in a political organization,” or the election or selection of presidential or vice presidential electors. 26 U.S.C. § 527(e)(2). As a factual matter, therefore, an organization that avails itself of 527 status has effectively declared that its primary purpose is influencing elections of one kind or another.

PFA-VF’s public statements, fundraising solicitations, advertisements, and public communications all point specifically to a focus on influencing the 2004 presidential election. Indeed, the only candidates mentioned on PFA-VF’s website and in advertising of which the Commission is aware are President Bush or Senator Kerry. Furthermore, as noted above, PFA-VF’s website stresses the importance of compensating for the Democrats’ purported financial advantage and getting out PFA-VF’s opposing message.

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While PFA-VF claims that it “is dedicated to educating the American people regarding the public policy positions of candidates for federal, state and local office and mobilizing conservative voters,”⁶ neither its website nor any advertisement or public communication of which the Commission is aware contains any statement regarding any specific state or local candidate, or for that matter, any federal candidate other than President Bush or Senator Kerry.⁷ In fact, its website, advertisements, public communications and fundraising solicitations all point to an intention to influence the 2004 presidential election.⁸

For example, the following television advertisement entitled “Finish It” was paid for by PFA-VF:⁹

Audio	Visual
ANNOUNCER: These people want to kill us.	<i>On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg's killers and victims of terrorist attacks.</i>
They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans.	<i>On screen: Pictures showing 9/11 attack on Twin Towers and terrorist attacks in Russia and Spain</i>
John Kerry has a 30-year record of supporting cuts in defense and intelligence and endlessly changed positions on Iraq.	<i>On screen: Still Picture of Kerry; 30 years cuts in defense and intelligence</i>

⁶ This statement appears on PFA-VF's website, on IRS filings, and in PFA-VF's response to the complaint.

⁷ See Complaint at Exhibit A and PFA-VF response.

⁸ Brian McCabe has indicated that the intent of PFA-VF's disbursements appears to be influencing elections: “Progress For America was prepared to stay on the sidelines, and we did not initiate our efforts until the FEC ruled that they were not going to regulate 527 organizations. In light of the level of spending by groups on the other side, we need to stay fully engaged.” See <http://www.pfavoterfund.com/1151-15.1151-082504A.html> In soliciting more than \$72 million, PFA-VF lists as the first goal of its media campaign to “[l]evel the playing field on ads — it may not be possible to out raise even George Soros alone, but the PFA Voter Fund must try to reduce the lopsided advertising advantage the Democratic 527s have on the campaign trail today.” See <http://www.pfavoterfund.org/1151-95.html>

⁹ Jeanne Cummings, *Who Funded That Negative Ad?*, WALL ST. J., July 7, 2004, at A4. Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-03.mplarge.wmv>.

<p>Would you trust Kerry against these fanatic killers? President Bush didn't start this war, but he will finish it.</p> <p>Progress for America Voter Fund is responsible for the content of this message.</p>	<p><i>On screen: Would you trust Kerry? Pictures of President Bush addressing the US military</i></p> <p><i>On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund & Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.</i></p>
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Howard Kurtz of the Washington Post reported that PFA-VF spent \$15 million on the Ashley's Story ad,¹⁰ which, according to surveys, made one of the strongest impressions on voters in key states¹¹:

"Ashley's Story"¹²

Audio	Visual
<p>LYNN FAULKNER: My wife, Wendy, was murdered by terrorists on Sept. 11.</p> <p>ANNOUNCER: The Faulkners' daughter Ashley closed up emotionally. But when President George W. Bush came to Lebanon, Ohio, she went to see him as she had with her mother four years before.</p> <p>LINDA PRINCE: He walked toward me and I said, "Mr. President, this young lady lost her mother in the World Trade Center."</p> <p>ASHLEY FAULKNER: And he turned around and he came back and he said, "I know that's hard. Are you all right?"</p> <p>LINDA PRINCE: Our president took Ashley</p>	<p><i>On screen: Lynn Faulkner; picture of Wendy Faulkner with her two daughters</i></p> <p><i>On screen: picture of Ashley reading a book; Bush at a campaign rally in Ohio</i></p> <p><i>On screen: Linda Prince; Family Friend</i></p> <p><i>On screen: Ashley Faulkner</i></p> <p><i>On screen: President Bush embracing</i></p>

¹⁰ <http://www.washingtonpost.com/wp-dyn/articles/A28697-2004Nov5.html>

¹¹ <http://www.washingtonpost.com/wp-dyn/articles/A29189-2004Nov5.html>

¹² Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-02.mplarge.wmv>.

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in his arms and just embraced her. And it was at that moment that we saw Ashley's eyes fill up with tears.

ASHLEY FAULKNER: He's the most powerful man in the world and all he wants to do is make sure I'm safe, that I'm OK.

LYNN FAULKNER: What I saw was what I want to see in the heart and in the soul of the man who sits in the highest elected office in our country.

ANNOUNCER: Progress for America Voter Fund is responsible for the content of this message.

Ashley Faulkner

On screen: Lynn Faulkner; picture of President Bush with a fire fighter

Footage of a newspaper with President Bush embracing a girl captioned "Bush comforts daughter of 9/11 victim"

On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund & Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.

PFA-VF has focused its activities and operates overwhelmingly in "swing states," where the presidential election was most competitive. Indeed, PFA-VF provided detailed information on its plan to target battleground states with its ads: "To effectively air one TV thirty second ad in every battleground state will cost \$9 million. At the outset depending upon resources, PFA-VF may decide to advertise only in battleground markets where we believe we can play a decisive role."¹³ PFA-VF scheduled a two-week run for commercials, costing about \$1.9 million, in Missouri, Minnesota and Ohio, and Brian McCabe has stated that "we will be staying up in those states from now until November."¹⁴ Another ad was run for a week and a half in

¹³ See <http://www.pfavoterfund.org/1151-95.html>

¹⁴ See <http://www.pfavoterfund.com/1151-15.1151-082504A.html>

September across both Iowa and Wisconsin, with the buy in excess of \$1 million.¹⁵ In its own words, PFA-VF was formed “[i]n the wake of the FEC’s decision rejecting regulation of 527 political committees” “as the primary vehicle to counter the efforts of liberal 527 committees.” See <http://www.pfavoterfund.com/1151-15.1151-061104A.html> “We needed to form, start raising money and get on the air as quickly as we could to help level the playing field,” said McCabe. See <http://www.pfavoterfund.com/1151-15.1151-070904A.html>

Where, as here, the available information amply demonstrates that the objective of PFA-VF is to influence the 2004 presidential election and PFA-VF has apparently raised and spent millions of dollars in furtherance of that objective, it is appropriate for the Commission to investigate whether, among those millions spent and received, PFA-VF has made \$1,000 in “expenditures,” or received \$1,000 in “contributions.” If it has, PFA-VF is a political committee subject to the contribution limitations, source prohibitions, and reporting requirements of the Act.¹⁶ See 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b.

III. CONCLUSION

The Commission finds reason to believe that Progress for America Voter Fund violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the Commission; by failing to report its contributions and expenditures; by knowingly accepting contributions in excess of \$5,000; and by knowingly accepting corporate and/or union contributions.

¹⁵ <http://www.pfavoterfund.org/1151-15.1151-091304A.html>

¹⁶ To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986). In its responses to the various complaints, PFA-VF does not appear to dispute the complainants’ contention that its major purpose is to engage in federal campaign activity.